Nos. 82-2006 and 82-2015

In the Supreme Court of the United States

OCTOBER TERM, 1982

P. TAKIS VELIOTIS, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE G. DAVIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the enforcement of grand jury subpoenas requiring production of evidence used in a bankruptcy proceeding.

General Dynamics Corporation had substantial subcontracts with Frigitemp for work on vessels General Dynamics built with federal subsidies at its Quincy Massachusetts shipyards. Petitioner Veliotis was President and General Manager of the General Dynamics Quincy Shipbuilding Division, and Petitioner George G. Davis was Senior Vice

President of Frigitemp in charge of the Quincy subcontracts (Pet. App. A4).[1] In early 1978, Davis formed a new corporation, Intersystems Design and Technology Corporation ("IDT"), Frigitemp filed a petition in bankruptcy, and General Dynamics terminated its Frigitemp contracts and awarded them to IDT (Pet. App. A5).

In January 1980, Bankruptcy Judge Lewittes authorized the Frigitemp trustee in bankruptcy to investigate causes of action available to the estate (Pet. App. A5, A8). Pursuant to that investigation, the trustee sought to depose several General Dynamics Quincy employees, including petitioner Veliotis (see Bankr. R. 205). In ancillary proceedings before Bankruptcy Judge Lavien of Massachusetts, counsel for General Dynamics appeared and on February 19, 1980, sought a protective order to prevent the disclosure of the business secrets of General Dynamics and certain papers containing "inappropriate and scandalous" allegations about certain General Dynamics employees (Pet. App. A15-A16).[2] Judge Lavien concluded that no blanket protective order was appropriate. Instead, he directed counsel for General Dynamics to identify any documents containing proprietary or confidential business information; absent objection, those documents would be protected from public dissemination (App., *infra*, 3a). Petitioner Veliotis subsequently was deposed in the Rule 205 proceeding. Neither that testimony nor any other document was ever designated as proprietary or confidential (Pet. App. A16-A17).

The Frigitemp trustee also sought documents from petitioner Davis and IDT, and in June 1980, Judge Lewittes approved a protective order permitting the trustee to view

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[1] "Pet. App." references are to the Appendix of No. 82-2006.

[2] Those papers were an affidavit and memorandum filed by the trustee and the transcript of the February 19, 1980 hearing (Pet. App. A15).

those documents in counsel's office, but prohibiting him from copying them (Pet. App. A7).

In April 1981, Judge Lewittes approved a settlement between Davis, IDT and the Frigitemp trustee that required IDT to pay the Frigitemp estate $1.4 million and the trustee to deposit all relevant records in the Bankruptcy Court under seal (Pet. App. A7-A8).[3] The United States, which was a party to the bankruptcy proceeding because of outstanding tax liabilities of Frigitemp, was notified of the proposed settlement and did not file any objection thereto (*id.* at A40, A60-A65).[4]

Meanwhile, in March 1979, a grand jury that was investigating a number of allegations of criminal conduct by Frigitemp officers issued a subpoena to the Frigitemp trustee for a large number of documents in his possession. Rather than delivering all of those documents to the grand jury immediately, the trustee agreed to provide specific categories of documents included in the subpoena as the investigation reached them. In March 1982, the grand jury requested documents relating to the possible diversion of $5 million from Frigitemp through bribery, kickbacks, embezzlement, and fictitious invoices and contracts (Pet. App. A5, A8). Those documents included many that had been sealed pursuant to the April 1981 settlement approved by Judge Lewittes.

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[3]Although the documents sealed pursuant to this settlement evidently included petitioner Veliotis' Rule 205 testimony (see Pet. App. A7-A8, A38-A39), he does not rely in this Court on the settlement agreement in opposing disclosure of the documents.

[4]Judge Lewittes found the record insufficient to determine whether the government received notice of the sealing provisions (Pet. App. A62).

At the same time, the grand jury issued subpoenas to General Dynamics and petitioners Davis and IDT for documents that included records sealed under the settlement, and the government applied for a modification of the sealing order to permit it to have access to the sealed materials (Pet. App. A9, A34).

General Dynamics resisted disclosure of petitioner Veliotis' Rule 205 testimony, alleging that it was protected by an "understanding of confidentiality" with Judge Lavien and by the sealing order entered in connection with the settlement (Pet. App. A42). Petitioners Davis and IDT contended that the government was estopped from seeking a modification of the sealing order because they had relied to their detriment upon the government's failure to object to the settlement (*id.* at A41).

Judge Lewittes concluded (Pet. App. A33-A70) that the "understanding of confidentiality" related only to the protection of proprietary information in General Dynamics documents, not to Fifth Amendment protections for testifying witnesses (*id.* at A52-A55); that the sealing order barred the trustee, but not Davis or IDT, from disclosing the documents (*id.* at A50-A51); and that the government was not estopped from seeking grand jury access to the materials because—even assuming estoppel could be invoked against the government and the other elements of estoppel had been demonstrated (but see note 4, *supra*)— the government's conduct here violated no duty to petitioners (Pet. App. A59-A64). Judge Lewittes accordingly modified the sealing order as requested and directed the production of the documents (*id.* at A29-A31).

General Dynamics did not appeal the bankruptcy court's order, and has produced all the materials requested in the subpoena directed to it except the Veliotis testimony. Petitioner Veliotis was permitted to intervene to protest the

production of his testimony in the district court (Pet. App. A24-A25). He argued that its disclosure was prohibited both by the "understanding of confidentiality" recognized by Judge Lavien, and by a separate, out-of-court agreement between counsel for General Dynamics and the Frigitemp trustee, which was never reduced to writing or disclosed to Judge Lavien (*id.* at A17-A18).[5] The district court and the court of appeals rejected this argument and affirmed the bankruptcy court's resolution of all claims presented to it.

Petitioner Davis has responded to the subpoena insofar as it requires the delivery of IDT materials. Thus, the only remaining undisclosed documents, in addition to the Veliotis testimony, are the documents in the possession of the trustee, which are covered by both the March 1979 grand jury subpoena and the sealing order entered in connection with the April 1981 settlement.

1. Petitioner Veliotis claims that his deposition testimony in the Frigitemp bankruptcy proceeding may not be disclosed to the grand jury because of a "contract" between counsel for General Dynamics and the Frigitemp trustee (Pet. 4-5). But he points to no evidence that such a "contract" ever existed. It was not disclosed to the bankruptcy judge supervising the taking of the depositions, nor has it ever been asserted by either alleged party to the "contract" as a basis for nondisclosure.[6] Indeed, the terms of the understanding between those parties that *is* revealed by the

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[5]This latter agreement is evidently the "contract" upon which petitioner Veliotis relies in this Court (Pet. 4-5).

[6]Petitioner's implication (Pet. 6-7) that General Dynamics relied on the "contract" in opposing the disclosure in the Bankruptcy Court is incorrect. As noted page 4, *supra*, and as the opinion of Judge Lewittes confirms (Pet. App. A53-A56), General Dynamics relied on the "understanding of confidentiality" discussed at the February 1980 hearing before Judge Lavien (App., *infra*, 2a-3a), not the alleged "contract".

transcript of the hearing before Judge Lavien is inconsistent with the existence of such a "contract". Although petitioner claims (Pet. 6, 18) that the "contract" protected his entire testimony from disclosure, the understanding on record was only that if the "document production and the interrogation in the depositions" revealed confidential business information, General Dynamics would be permitted to identify and seek protection for that information (App., *infra*, 2a-3a).

Even assuming that the existence and terms of the alleged "contract" were established, it would not protect petitioner's testimony from disclosure pursuant to the grand jury subpoena. It is clear that private parties cannot by contract between themselves limit the scope of the grand jury's powers. *Branzburg* v. *Hayes*, 408 U.S. 665, 682 & n.21 (1972). Nothing in *Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979), upon which petitioner relies (Pet. 10-15), is remotely inconsistent with this self-evident principle.[7] *Martindell* simply affirmed a district court's refusal to modify, at the informal request of the government, a protective order entered under Fed. R. Civ. P. 26(c) that prohibited disclosure of certain depositions taken in a civil case.[8] Here, of course, there was no protective order establishing the conditions on which the depositions were to be taken. Instead, petitioner Veliotis relies only on an unrecorded agreement, never judicially approved, whose terms

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[7]To the extent that petitioner asserts an intra-circuit conflict between the instant case and *Martindell*, that is a matter for resolution by the Second Circuit, not this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[8]Even in that context, the court specifically noted that "we are not called upon in the present case to decide whether the Government might be entitled to enforcement of a subpoena compelling production of the depositions." 594 F.2d at 296 n.6.

he has not even now disclosed in any detail (see Pet. App. A18).[9]

2. The estoppel argument of petitioners Davis and IDT Corporation is equally without merit. Their claim is essentially that the government's failure to object to the bankruptcy settlement order of April 1981 requires the rejection of the subsequent request to modify that order to permit the disclosure of the documents. Although the government, as a tax creditor of Frigitemp, was notified of the settlement order in the bankruptcy proceedings, it was not a party to that settlement; as Judge Lewittes recognized (Pet. App. A63-A64) it accordingly had no obligation to voice any objections to it.[10]

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[9]Petitioner Veliotis' assertion (Pet. 17) that "there is no policy reason for requiring [him] to assert his Fifth Amendment privilege before he may rely upon a subsequent [*sic*] out-of-court agreement of confidentiality" is simply incorrect. As this Court explained in *Garner* v. *United States*, 424 U.S. 648, 655 (1976): "[u]nless a witness objects, a government ordinarily may assume that its compulsory processes are not eliciting testimony that he deems to be incriminating. Only the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled." See also *Maness* v. *Meyers*, 419 U.S. 449, 466 (1975); *United States* v. *Kordel*, 397 U.S. 1, 10 (1970); *Rogers* v. *United States*, 340 U.S. 367, 370-371 (1951). Thus, regardless of the basis upon which petitioner chose to testify in the Rule 205 proceeding rather than to rely on his Fifth Amendment privilege, he cannot now claim that privilege against the subsequent use of his testimony by the grand jury.

We note that at the time petitioner testified, he could not have known that the aspect of the bankruptcy proceeding to which his testimony was relevant would be settled and the record sealed; thus in choosing to testify, he necessarily assumed the risk that his testimony would become part of the public record if a judicial proceeding were to be instituted. Cf. *Martindell* v. *International Tel. & Tel. Corp.*, *supra*.

[10]Indeed, because the settlement increased the assets of the bankrupt by $1.4 million, the government as a tax creditor could scarcely be expected to object. As Judge Lewittes noted (Pet. App. A62) it is unclear whether the government was even notified of the sealing provisions in the settlement agreement.

The district court and the court of appeals affirmed Judge Lewittes' decision, including his finding that in this specific factual situation, the government's failure to object to the settlement breached no duty owed to petitioners. The petition in No. 82-2015 nevertheless rests entirely on "[t]he clear and irreconcilable conflict between the Second Circuit and Ninth Circuit as to what type of Government misconduct will give rise to Estoppel" (Pet. 6). Since, as the courts below found, there was no government misconduct here at all, this case is not an appropriate one to condsider any possible conflict on that issue.

In any event, no such conflict exists, at least where, as here, the only misconduct alleged is a failure to act. Both the Second Circuit (*Hansen* v. *Harris,* 619 F.2d 942 (1980), rev'd, 450 U.S. 785 (1981)) and the Ninth Circuit (*Brandt* v. *Hickel,* 427 F.2d 53 (1970); *United States* v. *Lazy FC Ranch,* 481 F.2d 985 (1973)) have held that affirmative misconduct by governmental employees can estop the government. Nothing in either Ninth Circuit case suggests that Circuit would reach a different result than the Second Circuit did on the facts of this case when the "misconduct" claimed is simply a failure to object to a settlement between private parties. Indeed, the Ninth Circuit emphasized in *Lazy FC Ranch, supra,* 481 F.2d at 989, that estoppel is appropriate only where affirmative misconduct results in serious injury to the person claiming estoppel and the public interest will not be unduly damaged by applying the bar. Here, the public interest in unfettered grand jury investigations is clear. Cf. *Branzburg* v. *Hayes, supra,* 408 U.S. at 689-690, 700.

In any event, this Court has recently reemphasized the narrow limits of the estoppel doctrine as applied to the government (*Schweiker* v. *Hansen,* 450 U.S. 785, 788 (1981)). The governmental actions upon which petitioners rely were, as the courts below concluded, not "misconduct"

at all. They were certainly less egregious than the actions found insufficient to justify application of the doctrine in *Hansen*. This case accordingly raises no substantial question concerning the applicability of the estoppel doctrine to the Government.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JUNE 1983

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In the Matter of	:	
FRIGITEMP CORPORATION, Bankrupt.	:	Bankruptcy No. MBD 80-1

BEFORE: Judge Harold Lavien

APPEARANCES:

Foley, Hoag & Eliot (by Christian M. Hoffman, Esq.) 10 Post Office Square, Boston, Massachusetts 02109, for General Dynamics Corporation; and

Carter W. Eltzroth, Esq., General Dynamics Corporation, 97 East Howard Street, Quincy, Massachusetts 02169.

Gelberg & Kronovet (by Steven M. Schatz, Esq.) 711 Third Avenue, New York, New York 10017; and

Goodwin, Procter & Hoar (by Carol Goodman, Esq.) 28 State Street, Boston, Massachusetts 02109, Trustees.

Room 1116 Federal Building
Post Office Square
Boston, Massachusetts.
Tuesday, February 19, 1980
3:30 p.m.

* * * * *

MR. HOFFMAN: I don't see any need for a written order at this time, I can discuss it with Mr. Schatz.

THE COURT: If you feel you need one you can submit it, if not I suppose you can always get those few pages of the transcript if there is a dispute.

MR. HOFFMAN: We will be submitting a stipulation, and we haven't had an opportunity to discuss this between the lunch break, regarding the confidentiality of this record and the papers that have been filed in this Court; and I think I would in that connection like to raise the additional question about the document production here. I would request also that the documents be maintained on a confidential basis because they do include confidential business information concerning our construction of LNG tankers, purchase orders that we let for them, amounts of money that we paid for them and so forth, and I would request that that document production and the interrogation in the depositions be also maintained under a stipulation of confidentiality of course subject to Mr. Schatz coming forward and indicating that there's some basis for doing otherwise.

THE COURT: Well, counsel, I didn't raise any issue before because both of you seemed to be in agreement, but it's really not the customary procedure to make any file a secret or restricted file unless there is really some compelling, scandalous or proprietary or other special information, and really I don't think we have that kind of a record that everything in it requires that kind of sealing.

MR. HOFFMAN: I'm not proposing that, your Honor. With respect to the affidavits that have been filed and the memoranda to date, I think we agreed this morning that there would be a stipulation because of the assertions of

certain "business crimes," they would be under seal as would the transcript relating to this morning and this afternoon's session. With respect to the document production, the Court is not going to be burdened with that. All I'm suggesting is those documents that we produce and are copied by Mr. Schatz and his associates not be disseminated to any further circles because they do contain business confidential material relating to LNG tankers that we construct and with respect to pricing and so forth of contracts. I don't know if he has any objection to it.

THE COURT: Mr. Schatz, you don't have any objection, do you, that any exhibits be used only for the purposes of potential litigation and not for other public dissemination?

MR. SCHATZ: None that I can think of offhand, your Honor, but my concern quite frankly is while there may be some documents that have a possible business confidentiality claim, and I have no problems with agreeing with respect to those documents, with respect to other documents I don't know. I was persuaded by the Court's argument that it isn't a secret proceeding and I don't know that it's necessary.

THE COURT: Counsel, as far as any documents that you produce that you feel have any proprietary or confidential business information, if Mr. Schatz disagrees with that designation, then I will hear you. But barring any disagreement, anything that you have so labeled Mr. Schatz is free to use for the development of the case, for those people necessary in preparing his case, but will not be made available for public dissemination.

MR. SCHATZ: Very well.

MR. HOFFMAN: Thank you, your Honor.

MR. SCHATZ: Of course we would be free if appropriate to seek the leave of the Court —

THE COURT: Of course.

Anything further, gentlemen?

MR. HOFFMAN: I don't think so, your Honor.

MR. SCHATZ: No, your Honor.

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